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No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

On Appeal from the California Court of Appeal, Second Appellate District

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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1. Unable to deny the conflict in the circuits and States regarding the First Amendment's applicability to personal jurisdiction, Appellees' response in effect is that the conflict is not enormous, but merely big.

They reach that conclusion first of all by never even citing the 1982 decision of the Supreme Court of Georgia that held "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga.

614, 617, 292 S.E.2d 717, 720 (1982), *quoting New York Times Co.* v. *Connor*, 365 F.2d 567, 572 (5th Cir. 1966). They argue that the D.C. Circuit's view does not count, even though there the district court held, relying on the Fifth Circuit line of cases, that "the fact that the Journal Company is a newspaper requires the weighing of different considerations," *Margoles* v. *Johns*, 333 F. Supp. 942, 946 (D.D.C. 1971); and the court of appeals, affirming, quoted and approved the district court's holding that "the same reasons which militated against the assertion of jurisdiction over foreign newspaper corporations whose local contacts arose solely out of the gathering of news also apply to limit our jurisdiction under the recently enacted long-arm statute" because it is "desirable in the public interest that many newspapers should maintain vigilant correspondents here." *Margoles* v. *Johns*, 483 F.2d 1212, 1222 (D.C. Cir. 1973). Appellees brush aside the Second Circuit's holding that "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters," and Judge Medina's concurring approval of "the First Amendment applied to the expanding subject of jurisdiction over the person." *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967).

Appellees cannot deny the conflict with the Fifth Circuit, because the court below acknowledged it. But Appellees hint that the Fifth Circuit view has weakened. The cases demonstrate just the opposite. *Edwards* v. *Associated Press*, 512 F.2d 258 (5th Cir. 1975), held: "In conclusion, we reaffirm the First Amendment protections we have woven into our prior *in personam* jurisdictional analysis . . . ." 512 F.2d at 268. And last year in the Eleventh Circuit, the court of appeals flatly held that "in this Circuit, as in the former Fifth Circuit, federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel." *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937 (11th Cir. 1982).

Everyone except Appellees recognizes the First Amendment's role in jurisdiction to be an important unsettled issue of constitutional law and jurisdiction. Lower court judges are faced with it all the time, with no explicit guidance from this Court. For instance, Chief Judge Lord of the Eastern District of Pennsylvania noted last year, in rejecting the position of the court below, that "the Tenth Circuit purports to be in complete disagreement with the Fifth Circuit on this issue." *McCabe* v. *Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648, 655 (E.D. Pa. 1982).[1]

2. The "fiduciary shield" doctrine, which most courts apply but the court below rejected, holds that the acts of an out-of-state corporate employee on behalf of the corporation do not provide extraterritorial personal jurisdiction over the employee. The federal courts in California follow this rule. *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978); *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371 (9th Cir. 1977). Indeed, courts often hold that jurisdiction is barred even when the employee committed allegedly tortious acts in the forum state itself. See, *e.g.*, *Bulova Watch Co.* v. *K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E.D.N.Y. 1982).

Appellees try to minimize the fact that the court below, in listing the cases it rejected, specifically included the leading Ninth Circuit case, *Forsythe* v. *Overmyer*, *supra*. See Jurisdictional Statement at 10a. Appellees

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[1] Appellees incorrectly state, Motion To Dismiss or Affirm, at 13 n.16, that *McCabe* "turns on the long arm statute of Pennsylvania." The court in that case held: "Because the Pennsylvania statute extends jurisdiction to the fullest extent permitted under the Constitution, however, the only inquiry required is whether assertion of jurisdiction over KJAI is consistent with the due process standards set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. I therefore proceed immediately to the constitutional question." 531 F. Supp. at 649-50 (footnote omitted).

also argue that other cases applying the fiduciary shield doctrine rested on construction of state jurisdictional statutes rather than on the due process clause. As was noted in the Jurisdictional Statement, at 14-15, that is so in some instances, *e.g.*, *Marine Midland Bank* v. *Miller*, 664 F.2d 899 (2d Cir. 1981). Many of the holdings, however, are squarely rested on the due process clause:

> "[S]everal courts have held that the doctrine is a constitutional principle, applied to determine whether the exercise of jurisdiction comports with fair play and substantial justice. [Citing cases.] . . . We find the latter view persuasive and will therefore apply the doctrine as a due process limitation on the exercise of jurisdiction." *State ex rel. Miller* v. *Internal Energy Management Corp.*, 324 N.W. 2d 707, 711 (Ia. 1982).

Accord, *e.g.*, *Hurletron Whittier Co.* v. *Barda*, 402 Ill. App. 3d 443, 448, 402 N.E. 2d 840, 843 (1980) ("the requirements of the due process clause"); *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927, 929, 931 (6th Cir. 1974) ("It is settled that jurisdiction over the individual officers of a corporation cannot be predicated merely upon jurisdiction over the corporation"; "if the statute were construed to permit suit in Ohio we would still be faced with grave questions as to its constitutionality.").

3. Appellees argue that personal jurisdiction is achieved because the complaint (like most libel complaints) alleges intent. But extraterritorial personal jurisdiction depends on facts, not allegations of state of mind. Allegations of intent cannot substitute for the contacts required by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). "Jurisdiction is lacking . . . unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*." *Rusk* v. *Savchuk*, 444 U.S. 320, 328 (1980).

"Where a motion to quash or dismiss is filed, supported by affidavits, the non-moving party may not rest upon allegations or denials in his pleadings but his response by affidavit or otherwise must set forth specific

facts showing that the court has jurisdiction." *Weller* v. *Cromwell Oil Co.*, *supra*, 504 F.2d at 929-30. And " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295 (1980).

Here the trial court found as follows:

> "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial." Jurisdictional Statement, at 16a.

That is the factual underpinning for the claim of extra-territorial personal jurisdiction here: no contacts at all with California by Editor Calder, and only four telephone calls, plus one court-inferred visit, by South.[2]

4. Appellees quote, Motion, at 21, from § 37 of the RESTATEMENT (2d), CONFLICT OF LAWS, but they stop quoting too soon. The section they partially quote goes on to say:

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[2] Appellees, with no citation, say they believe South made more than three investigation-related telephone calls to California. Motion To Dismiss or Affirm, at 6 n.6. Three are all that are shown in the record, however. C.T. 139-40, 150-51. In addition, South telephoned Appellee Ingels once before publication to read him the story. Ingels' statements to South that "none of it is true" but nevertheless he was "flattered" were included in the story as published. See Appendix to Motion To Dismiss or Affirm, at 3. It is undisputed that all South's telephone calls were from Florida. Jurisdictional Statement, at 25a.

"Caveat:

"The Institute expresses no opinion whether in situations where the interests of the defendant are protected by the First and Fourteenth Amendments of the Constitution, it is necessary that a State have a more substantial basis for the exercise of judicial jurisdiction over a non-resident defendant than would otherwise be required.

* * * *

"*d. Comment on the Caveat:* An action for defamation is an example of an action which may affect interests of the defendant that are protected by the First and Fourteenth Amendments of the Constitution. For a State to have judicial jurisdiction over a non-resident defendant in actions of this sort, it may be that the defendant must have a closer relationship to the State, or have caused effects in the State of a more substantial nature, than would otherwise be required." *Id.* at 156, 159.

5. Surprisingly—but like the court below—Appellees completely ignore the applicable holdings of this Court. They do not even cite, much less try to reconcile the California court's decision with: *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*; *Rusk* v. *Savchuk*, *supra*; *Kulko* v. *Superior Court*, 436 U.S. 84 (1978);[3] *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); or *Hanson* v. *Denckla*, 357 U.S. 235 (1958). Like the California court's opinion, Appellees' analysis is sketched on a clean slate, as if the precedents of this Court did not exist.

6. Appellees contest this Court's jurisdiction under 28 U.S.C. § 1257(2). Their argument is that because the California jurisdictional statute on its face conforms to constitutional limits, therefore "it is impossible for it to be either unconstitutional on its face or as applied." Motion To Dismiss or Affirm, at 2. Appellees' proposition is half correct. The California statute indeed is not

[3] Appellees do cite *Kulko* on another point. Motion To Dismiss or Affirm at 2.

unconstitutional on its face. The challenge here, however, was to the statute *as applied*,[4] and such a challenge, when rejected by the state court, is properly heard by this Court on appeal. See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921). Under Appellees' theory, decisions upholding state statutes challenged as applied could never be heard on appeal if the statutes were drafted to be constitutional on their face. That notion was long ago rejected. *Dahnke-Walker Milling Co.* v. *Bondurant*, *supra*. This Court has jurisdiction under § 1257(2).

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[4] Appellees' reference in this context to *Kulko* v. *Superior Court*, 436 U.S. 84 (1977), is misplaced. In *Kulko* appeal was improper because the constitutionality of the state statute itself had not been challenged below. Here, however, the statute was challenged below on the ground that as applied to Appellants it was repugnant to the Constitution, and the state court decided in favor of the statute's validity. The court below applied the California statute to Appellants in the face of Appellants' arguments that "were it to be interpreted otherwise [than as excluding Appellants], § 410.10 would violate the Due Process Clause of the Fourteenth Amendment." *Cf. Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979).

CONCLUSION

For the reasons stated here and in the Jurisdictional Statement, this Court should note probable jurisdiction.

Respectfully submitted,

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